

LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U. S.
FILED

MAR 18 1954

HAROLD B. WELLEY, Clerk

No. 36

In the Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, APPELLANT,

VERSUS
JACOB J. SHUBERT, MARCUS ELLMAN,
UNITED ROSE SHOE CO., INC., INCORPORATED, SHERIDAN LEE
ARTHUR CORPORATION, L. A. R. ARGUMENT CORPORATION

FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 56-72

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN,
UNITED BOOKING OFFICE, INCORPORATED, SELECT THE-
ATRES CORPORATION, L.A.B. AMUSEMENT CORPORATION,
DEFENDANTS.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause on December 30, 1953. A petition for appeal is presented to the district court herewith, to-wit, on this 18th day of February, 1954.

OPINION BELOW

The opinion of the District Court for the Southern District of New York, which is not yet reported, reads in full as follows:

In principle, I can see no valid distinction between the facts of this case and those which were before the Supreme Court in the cases of *Federal*

Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U. S. 200, and *Toolson v. New York Yankees et al.*, decided by the Supreme Court on November 9, 1953.

Upon the authority of these adjudications the complaint in the above entitled action will be dismissed.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

United States v. Women's Sportswear Mfg. Ass'n,
336 U. S. 460;

United States v. New Wrinkle, Inc., 342 U. S. 371.

QUESTIONS PRESENTED

1. Whether the decision in *Toolson v. New York Yankees*, 346 U. S. 356, is controlling as to the application of the Sherman Act to the business in which the defendants are engaged—the production, booking, and presentation, on a multi-state basis, of plays and other theatrical attractions.

2. Whether this business is “trade or commerce among the several States” within the meaning of Sections 1 and 2 of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2, and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15

U. S. C. 1, 2, 4), commonly known as the Sherman Act, are as follows:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

* * * * *

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action brought by the United States under Section 4 of the Sherman Act. The complaint charges (par. 50) that the defendants have been engaged for many years in a conspiracy in restraint of interstate trade and commerce in the production, booking and presentation of "legitimate attractions,"¹ and that

¹As used in the complaint, the words "legitimate attractions" mean "stage attractions performed in person by professional actors," including plays, musicals and operettas, but not ordinarily includ-

they have conspired to monopolize, attempted to monopolize, and monopolized the booking of these attractions throughout the United States and their presentation in eleven leading cities ranging in location from Boston to Los Angeles.²

Following the decision of this Court in *Toolson v. New York Yankees*, 346 U. S. 356, the defendants filed a motion to dismiss the complaint upon the authority of that decision. The district court, following submission of briefs and oral argument, ruled that there was no valid distinction between the facts set forth in the complaint in the present case and those which were before this Court in the *Toolson* case and in *Federal Baseball Club v. National League*, 259 U. S. 200. The court therefore entered a judgment dismissing the complaint.

The defendants are three individuals—Lee Shubert,³ Jacob J. Shubert, and Marcus Heiman—and three corporations controlled by them—United Booking Office, Inc. (UBO), Select Theatres Corporation (Select), and L. A. B. Amusement Corporation (L.A.B.). The prin-

ing stock company performances, vaudeville, burlesque, dance groups, bands or concerts (par. 9).

“Presentation” means “the operation of a theatre or theatres and the exhibition of legitimate attractions therein” (par. 12).

“Booking” means the arrangements made “for the routing and presentation of legitimate attractions and the fixing of playing dates,” including the making of agreements for presentation of legitimate attractions (par. 14).

“Production” is alleged to involve “(1) the assembling of the elements of a legitimate attraction, including a script, financial backing, actors, stage hands, designers, advertising agents, scenery, costumes, lighting and music; (2) rehearsals to weld the parts into a legitimate attraction suitable for presentation; (3) arranging for the booking and presentation of the attraction in a try-out town or towns; in New York City; and in road-show towns; and (4) transporting the entire cast and scenery to try-out towns, New York City and road show-towns throughout the United States to fulfill these booking and presentation arrangements” (par. 24).

² A copy of the complaint is attached hereto as Appendix A.

³ Lee Shubert died prior to entry of the judgment of dismissal.

cial business of UBO is booking, but it also finances productions (par. 5). Select, together with subsidiaries, operates approximately 19 theatres in various states, arranges booking for theatres in its chain, and produces various legitimate attractions (par. 8). L.A.B. operates three theatres and invests in the production of numerous legitimate attractions (par. 7).

The principal facts stated in the complaint, which presently must be taken as true, are as follows:

At the present time the cost of producing a play runs from \$60,000 to \$100,000, and of a musical from \$200,000 to \$300,000. Persons other than the producer usually supply the necessary financing. Frequently a play is incorporated, with shares of stock sold to investors, or the producer organizes a partnership in which investors become limited partners.

After the producer has assembled the proper cast, scenery, costumes, etc. (see par. 24, note 1, *supra*), and after rehearsals have been completed, the attraction is presented in one or more "try-out" towns⁴ for the purpose of judging audience reaction and correcting any observed deficiencies (pars. 20, 26). The next step is presentation in New York City (par. 27). If the run there is successful, the producer sends the attraction on tour to "road-show" towns, that is, cities in which presentation follows a New York run (pars. 21, 27).⁵

With the exception of a few cities, a legitimate attraction ordinarily cannot profitably play in a road-show town for more than a limited period of time, sel-

⁴ The key try-out towns are Boston, Philadelphia, Baltimore and New Haven, and until recently (the complaint was filed in February 1950) Washington, D. C., was also a key try-out town (par. 26).

⁵ A city may be both a road-show town and a try-out town (par. 21).

dom exceeding two weeks. The producer of a play must therefore obtain playing dates in a number of suitable road-show towns, arranged so as to minimize travel between engagements. Successful operation of a theatre in a road-show town also requires scheduling legitimate attractions so as to keep the theatre as continuously occupied as possible during the theatrical season. Playing dates of a road-show town must therefore be arranged so as to meet the needs of both the producer and the theatre operator (par. 29).

UBO acts as middleman between producers and operators of theatres in try-out and road-show towns, but it is regarded as the agent of the theatre operators and it usually receives, as compensation for its services, 5% of the operator's share of the gross receipts of presentation (par. 28). Each year UBO enters into or renews arrangements with theatre operators to act as their booking agent (par. 30). After negotiations with the producer of an attraction, UBO tentatively schedules it at various road-show theatres, and contracts covering presentation at these theatres are subsequently executed (*ibid.*).

The individual defendants control the booking of legitimate attractions in try-out and road-show towns throughout the United States (par. 37). Apart from Select and a subsidiary thereof, UBO is the only concern in the country which books legitimate attractions throughout the United States (par. 5). From 1932 to 1946 UBO followed the policy of entering into franchise agreements with theatre operators making UBO exclusive booking agent for the theatres covered by the agreements (par. 40). About 1946 UBO discontinued formal franchise agreements, and it adopted in lieu thereof a system of listings which, as tacitly understood by the

parties, continued the previous contract arrangements (*ibid.*).

The defendants operate or participate in the operation of approximately 40 theatres in eight states, and they operate or control the only theatres in the key try-out towns,⁶ as well as in several important road-show towns (par. 42). Approximately 50% of all the theatres in New York City are owned or operated by the Shubert defendants (pars. 15, 41).

In producing, booking, and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the various states, consisting of assemblage of personnel and property for rehearsals, transportation of such personnel and property to various cities, making and performing contracts under which attractions are routed and presented in various states, and transmission of applications, letters, memoranda, communications, contracts, checks, drafts and other media of exchange across state lines (par. 49).

The substantial elements of defendants' conspiracy to restrain, conspiracy to monopolize, monopolization, and attempted monopolization have been that the defendants, by concert of action: (a) compel producers to book their legitimate attractions exclusively through defendants; (b) exclude others from booking legitimate attractions; (c) prevent competition in presentation of these attractions; (d) discriminate in favor of their own productions with respect to booking and presentation and (e) combine their power in booking and pres-

⁶In New Haven the only theatre is operated under a five-year agreement with a subsidiary of Select, which provides that the operator will accept only attractions booked through this subsidiary (par. 43).

entation in order to maintain and strengthen their domination in each of these fields (par. 51).

The means which the defendants have employed in carrying out the violations of the statute charged against them have included the following:

(a) Conditioning their investments in legitimate attractions produced by others, and conditioning the booking of legitimate attractions in try-out towns and in New York City, upon agreements by the producers to book these attractions exclusively through defendants;

(b) Forcing producers to book their legitimate attraction for an entire theatrical season exclusively through defendants;

(c) Coercing producers who had booked through others to pay penalties or to accept discriminatory booking terms, as a condition of obtaining bookings through them;

(d) Entering into agreements with theatre operators whereby the operators agree to present only attractions booked through defendants, and agreeing not to book for competing operators;

(e) Excluding legitimate attractions booked by others from theatres operated by defendants; and

(f) Coercing and intimidating operators of theatres located in towns where defendants operate theatres to relinquish control of their theatres by threatening to deprive them, by virtue of defendants' control of booking, of access to legitimate attractions (par. 52).

Some of the effects of defendants' concerted action have been that producers have been forced to book exclusively with defendants; persons have been denied the right to engage in the business of operating a book-

ing office; operators of theatres competing with those of defendants have been systematically prevented from obtaining legitimate attractions and, in many cities, have been forced out of business; in cities in which the defendants operate theatres the public has been deprived of access to legitimate attractions and the benefits which flow from free and open competition (par. 53).

THE QUESTIONS ARE SUBSTANTIAL

The complaint charges the defendants with using their monopolistic position in the business of booking legitimate attractions throughout the United States, and their monopolistic position in the ownership and operation of theatres located in numerous leading cities in different states, to restrain interstate production, booking and presentation of legitimate attractions. We submit that there can be no doubt that the violations of the Sherman Act so charged come within its prohibitions if these violations are governed by the usual criteria for determining the application of the statute. See *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533; *United States v. Crescent Amusement Co.*, 323 U.S. 173; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131; *United States v. Women's Sportswear Mfg. Assn.*, 336 U.S. 46. We understand that the district court did not think otherwise, but viewed the case as controlled by the decision of this Court in *Toolson v. New York Yankees*, 346 U.S. 356.

In considering whether the district court misinterpreted the scope of the *Toolson* decision, the starting point must be the basis of that decision. The Court there said it had held in 1922 in *Federal Baseball Club v. National League*, 259 U.S. 200, that the business of pro-

viding exhibitions of baseball games between clubs of professional baseball players is not within the scope of the Sherman Act; that Congress subsequently had not seen fit to enact legislation bringing this business under the Act; and that for thirty years the business had been left to develop "on the understanding that it was not subject to existing antitrust legislation." The Court, in these circumstances, concluded that if there are evils in this field which now warrant bringing it under the antitrust laws, "it should be by legislation," rather than by overruling its 1922 decision, "with retrospective effect." The Court therefore affirmed dismissal of the Toolson complaint "on the authority of" the *Federal Baseball* case, "[W]ithout re-examination of the underlying issues."

The opinion in the *Toolson* case makes it patent that the decision represents, and represents solely, an application of the rule of *stare decisis*. The aspects of the theatrical business here involved are within this rule only if this Court has authoritatively determined that they are governed by its decision in the *Federal Baseball* case. We submit that there has been no such authoritative determination.

We do not read the *Toolson* case as even remotely implying that the field of entertainment, which is an important part of our commercial structure, is not governed by the Sherman Act. Other cases dealing with the motion picture industry, which distributes "plays" on film, prove the contrary. In those cases restrictions permitting only certain theatres operated by a defendant to obtain pictures—restrictions exactly like those alleged here with respect to the booking of plays—have been held to violate the Sherman Act. *United States v.*

Crescent Amusement Co., 323 U.S. 173; *United States v. Griffith*, 334 U.S. 100; *Schine Theaters v. United States*, 334 U.S. 110; *United States v. Paramount Pictures*, 334 U.S. 131. In the motion picture cases the necessary restraint or monopoly of interstate commerce exists because the films in which the "plays" appear were sent from producers to distributors across state lines. It should certainly make no difference that the plays the interstate distribution of which is restrained are not reduced to film, or that all of the paraphernalia of a play rather than a picture of it is sent in interstate commerce. The interstate transportation of everything which goes to make a play a unit, including the performers, is no less interstate trade and no less commercial because not on a film. A play represents a welding together of plot and script, members of the cast, scenery, costumes, music and other elements, in order to make a composite whole which is distinct from its component parts and the individual actors, and which constitutes an independent product the subject of trade and barter. Cf. *Ring v. Spina*, 148 F. 2d 647, 650 (C.A. 2). And there is no reason why restraints of that kind of trade should be any the less subject to the Sherman Act because the play is not in film.

The movie cases also show that restraints on interstate distribution for the purpose of controlling local exhibition policies, such as admission prices and double featuring, violate the Sherman Act. *Interstate Circuit v. United States*, 306 U.S. 208. Such restraints are more closely concerned with local exhibition than are those alleged here.

It thus clearly cannot be said that, apart from baseball, the interstate distribution of entertainment is

exempt from the Sherman Act. Approximately a year after the *Federal Baseball* decision, this Court reversed a judgment dismissing a Sherman Act complaint which charged that the plaintiff had been injured by reason of defendants' combination to control and monopolize the booking of vaudeville acts in vaudeville theatres throughout wide areas of the country. *Hart v. Keith Exchange*, 262 U.S. 271. This Court, in an opinion by Mr. Justice Holmes, declared (p. 273) that the basis of the district court's ruling was that "the dominant object of all the arrangements was the personal performance of the actors, all transportation being merely incidental to that." The Court noted (*ibid.*) on the other hand that the plaintiff contended that in the transportation of vaudeville acts the apparatus—scenery, costumes, animals, etc.—"sometimes is more important than the performers." The Court held that the complaint provided factual support for this contention, and that it set forth, at least to this extent, a violation of the statute.

Certainly this decision, which holds that some restraints on the theatrical business may violate the Sherman Act, did not place the theatres in the same exempt category as baseball. It is clear, therefore, that theatrical business of the kind here involved has not been left to develop over a long period of time upon the definite understanding that it is outside the scope of the Sherman Act. There is lacking, accordingly, the rationale of the *stare decisis* rule of the *Toolson* case.

We submit that the scope of the *Toolson* decision, as raised in this appeal, clearly presents a substantial question. The question is also of manifest importance to the Government in its administration of the antitrust

laws and to private litigants. There necessarily is, at present, doubt and uncertainty respecting whether the *Toolson* decision conclusively settles, solely by reason of *stare decisis*, the application of the Sherman Act to any business other than professional baseball and, if so, to what other businesses or aspects of other businesses.⁷

We submit that the questions presented by the appeal are substantial and of public importance.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

⁷In *United States v. International Boxing Club of New York, Inc.* (S.D. N.Y.), the district court recently dismissed, under authority of the *Toolson* case, a Sherman Act complaint charging illegal restraint and monopolization of interstate commerce "in the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests," notwithstanding factual allegations which, in the view of the Government, present issues as to the application of the Sherman Act not controlled by either the *Toolson* case or the *Federal Baseball* case.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 56-72

Filed February 21, 1950

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN,
UNITED BOOKING OFFICE, INCORPORATED, SELECT
THEATERS CORPORATION, L. A. B. AMUSEMENT COR-
PORATION, DEFENDANTS

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants named herein and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act.

2. All the defendants inhabit, maintain their principal offices, transact business, and are found within the Southern District of New York.

DESCRIPTION OF DEFENDANTS

3. Lee Shubert and Jacob J. Shubert (hereinafter referred to as the Shuberts) are made defendants herein. The Shuberts are brothers and are residents of the City of New York, New York. Through the defendant Select Theatres Corporation and other corporations controlled by them, the Shuberts operate or participate in the operation of approximately 37 theatres in various States of the United States, produce and invest in numerous legitimate attractions, and own and rent rights to various attractions. The Shuberts together with the defendant Marcus Heiman are in active charge of the management, direction, and operation of the defendant United Booking Office, Incorporated. Lee Shubert is vice-president and a director of the defendant United Booking Office, Incorporated.

4. Marcus Heiman, a resident of the City of New York, New York, is made a defendant herein. Through the defendant L. A. B. Amusement Corporation and other corporations in which he has a financial interest, Marcus Heiman operates or participates in the operation of five theatres in various States of the United States and has invested in numerous legitimate attractions. Marcus Heiman together with the defendants Lee Shubert and Jacob J. Shubert is in active charge of the management, direction, and operation of the defendant United Booking Office, Incorporated. Marcus Heiman is president and a director of the defendant United Booking Office, Incorporated.

5. United Booking Office, Incorporated (hereinafter referred to as UBO) is made a defendant herein. UBO is a corporation organized and existing under the laws of the State of New York and has its principal place

of business at 234 West 44th Street, in the City of New York, New York. With the exception of the defendant Select Theatres Corporation and its subsidiary, Select Operating Corporation, UBO is the only booking office in the United States engaged in the business of booking legitimate attractions in theatres throughout the United States. It has also engaged in the financing of the production of many attractions. UBO has outstanding 500 shares of capital stock of which 250 shares are owned by the defendant Marcus Heiman and 250 shares by the defendant Select Theatres Corporation. The defendants Marcus Heiman, Lee Shubert, and Jacob J. Shubert are in active charge of the management, direction, and operation of UBO.

6. Select Theatres Corporation (hereinafter referred to as Select) is made a defendant herein. Select is a corporation organized and existing under the laws of the State of New York and has its principal place of business at 234 West 44th Street, in the City of New York, New York. It has approximately 19 subsidiary companies and 4 affiliated companies, some of which are presently inactive. Select and its subsidiaries operate approximately 19 theatres in various States of the United States. Select, directly and through subsidiary corporations, arranges bookings for several theatres in its chain, produces and invests in the production of legitimate attractions, and owns and rents rights to various attractions. The defendants Lee Shubert and Jacob J. Shubert own all the preferred stock and over 80% of the common stock of Select and are in active charge of its management, direction, and operation.

7. L. A. B. Amusement Corporation (hereinafter referred to as LAB) is made a defendant herein. LAB is a corporation organized and existing under the laws of the State of New York and has its principal place

of business at 234 West 44th Street, in the City of New York, New York. It operates three theatres in three States and has invested in the production of numerous legitimate attractions. The defendant Marcus Heiman owns all the stock of LAB and is in active charge of its management, direction, and operation.

III

DEFINITION OF TERMS

8. Each of the following terms as used herein has the meaning described below:

9. *Legitimate attractions*—stage attractions performed in person by professional actors. Such attractions include plays, musicals, and operettas. The term ordinarily does not include stock company attractions, vaudeville, burlesque, bands, individual dancers, dance groups, concerts, and vocal or instrumental presentations.

10. *Theatre*—a theatre which customarily presents legitimate attractions.

11. *Producer*—any person, partnership, association or corporation engaged in the production of legitimate attractions.

12. *Presentation*—the operation of a theatre or theatres and the exhibition of legitimate attractions therein.

13. *Operator*—any person, partnership, association or corporation engaged in presentation.

14. *Booking*—the arrangement, generally made through a booking office, between producers and operators for the routing and presentation of legitimate attractions and the fixing of playing dates. The term includes entering into agreements for the presentation of legitimate attractions.

15. *Shubert-operated theatre*—a theatre which is

owned or operated by the defendants Shuberts or either of them or by any of the corporations controlled by them.

16. *Heiman-operated theatre*—a theatre which is owned or operated by the defendant Marcus Heiman or by any of the corporations controlled by him.

17. *Franchise*—a contract between an operator and the defendant UBO whereby UBO is appointed exclusive booking agent for the operator.

18. *Affiliated theatre*—a theatre which had or has a franchise with the defendant UBO or a similar working arrangement with any of the defendants herein or with any of the corporations controlled by them.

19. *Independent theatre*—a theatre which is not an affiliated theatre or in which the defendants have no financial interest.

20. *Try-out town*—a city where a legitimate attraction is presented for the purpose of judging audience reaction and eliminating observed deficiencies, prior to presentation in New York City.

21. *Road-show town*—a city where a legitimate attraction is presented after its presentation in New York City. A road-show town may also be a try-out town.

22. *Theatrical season*—the period from September of one year through May of the next.

IV

DESCRIPTION OF THE BUSINESS

23. The three branches of the legitimate theatre business herein relevant are production, booking, and presentation.

24. Production involves (1) the assembling of the elements of a legitimate attraction, including a script, financial backing, actors, stage hands, designers, advertising agents, scenery, costumes, lighting and music;

(2) rehearsing, to weld the parts into a legitimate attraction suitable for presentation; (3) arranging for the booking and presentation of the attraction in a try-out town or towns; in New York City; and in road-show towns; and (4) transporting the entire cast and scenery to try-out towns, New York City and road-show towns throughout the United States to fulfill these booking and presentation arrangements.

25. At the present time a play costs approximately \$60,000 to \$100,000 to produce, whereas a musical generally requires from \$200,000 to \$300,000. As much as one-third of the cost may be attributable to expenditures for scenery, props and related items and services. The producer usually does not invest money in his own attraction but finances it almost entirely with risk capital. The producer often incorporates the legitimate attraction as a separate venture and sells shares of stock therein to investors, or he may organize a limited partnership with the investors sharing in the venture. The producer usually begins to share in the profits only after the investors are paid back their total investments, after which the profits are generally divided 50% to the producer and 50% to the investors.

26. When rehearsals are completed, the producer arranges for the presentation of the attraction for a period of one to four weeks in a theatre in one or more try-out towns. Key try-out towns are Boston, Massachusetts; Philadelphia, Pennsylvania; Baltimore, Maryland; and New Haven, Connecticut. Until recently, when its last remaining theatre was converted into a motion-picture house, Washington, D. C. was also a key try-out town. The reaction of audiences in try-out towns is important in gauging the attraction's financial success on subsequent presentations in New York City and road-show towns.

27. If the try out is satisfactory, the attraction is

then presented in a theatre in New York City. To return any profit an attraction must generally run in a New York City theatre for a minimum of twenty weeks; to be considered a hit it must usually play to capacity or near capacity audiences in that city for a full theatrical season. If the New York City run is successful, the producer sends the attraction on tour to road-show towns throughout the United States. This road-show tour, which may be made by one or more companies, is an integral part of the exploitation of the attraction and a substantial part of its profits are so obtained.

28. The defendant UBO acts as middleman between producers and the operators of theatres in try-out and road-show towns. The booking of legitimate attractions involves the fixing of playing dates in various theatres and the cross-country routing of attractions, in a constant stream, to and from theatres in various cities throughout the United States. Although services are performed for both producers and operators, by custom and usage the defendant UBO is regarded as the agent of, and receives payment from, the operator. Generally, the producer and the operator divide the gross theatre admission receipts on a stipulated percentage basis. The defendant UBO usually receives for its services 5% of the operator's share of the gross receipts.

29. With the exception of a few cities a legitimate attraction ordinarily cannot profitably play in any one road-show town for more than a limited period of time, seldom exceeding two weeks. Therefore, successful operation of a theatre in a road-show town requires the presentation of a series of legitimate attractions so scheduled as to keep the theatre as continuously occupied as possible during the theatrical season. The producer, on the other hand, because of the fact that

he cannot keep his attraction in any one road-show town for more than a short time, must play in a number of road-show towns during the tour. For a profitable tour, the producer must obtain a series of suitable road-show playing dates so arranged as to minimize lay-offs and travel between engagements. In view of these considerations, playing dates of the producer and operator must be coordinated to permit each to meet his requirements.

30. The defendant UBO, generally before the beginning of each theatrical season, enters into or renews arrangements with operators throughout the United States to act as their agent in the booking of legitimate attractions. A producer seeking bookings consults the defendant UBO which thereupon examines its various schedules to determine the available open time at theatres suitable for the attraction. Normally, after considerable negotiation with the producer, the defendant UBO "pencils in" playing dates for the attraction and then notifies the operators accordingly. Subsequent contracts are entered into covering the presentation of the attraction at various theatres throughout the United States.

31. Booking in New York City differs from booking in try-out and road-show towns. Independent theatres in New York City are ordinarily booked through direct negotiation between producer and operator. Shubert-operated theatres in New York City are booked by an agent of the Shuberts who is also one of the two booking managers for the defendant UBO.

32. Playing dates for theatres in try-out and road-show towns are generally for a fixed period of time, after which the attraction is moved to another town. On the other hand, in New York City an attraction is booked to run indefinitely, provided it grosses a specified amount each week. This provision is known as a

“stop clause.” If the attraction grosses less than the minimum in the “stop clause,” either party has the option of removing the attraction from the theatre after prescribed notice has been given.

33. The operator enters into a contract with the producer to make his theatre (whether located in a try-out or a road-show town or in New York City) available to the producer for a specified legitimate attraction. Usually the operator receives his compensation in the form of a percentage, varying from 20% to 40% of the total gross theatre admission receipts. However, in many instances the operator will insist that the producer guarantee payment of a minimum sum. The operator furnishes the theatre, including light, heat, and a limited number of service personnel, and in conjunction with the producer prepares the legitimate attraction for presentation in the theatre. In addition, the operator may pay all or part of the cost to “take-in” and set up the scenery and paraphernalia, as well as furnish a limited number of stage-hands and musicians. When the engagement is concluded the operator may pay part or all of the cost of “taking-out” the scenery and paraphernalia and preparing same for shipment to the next theatre. The operator may also pay part of the cost for advertising the attraction. The producer, on the other hand, usually must bring with him and furnish all the necessary scenery, costumes, props, and special lighting effects, together with a complete cast. The producer also provides advertising material prior to the presentation of the attraction and must provide personnel in addition to those provided by the operator.

34. Operators outside of New York City are financially dependent upon a steady flow of legitimate attractions. Theatres in try-out and road-show towns supply a market for legitimate attractions which is of vital importance to the profitable presentation and exploitation

of such attractions. Moreover, theatres in road-show towns provide an opportunity for the producer of a popular attraction to have access to the widest possible market.

V

POSITION OF THE DEFENDANTS IN THE BUSINESS

A. Production

35. For a number of years the defendants Shuberts and corporations controlled by them engaged in both the production of their own legitimate attractions and the financing of attractions of other producers. At the present time their production activities are concentrated largely in the latter field. The defendant Heiman and corporations controlled by him likewise engage in the financing of the production of legitimate attractions.

36. The defendants, moreover, have entered into various arrangements with the Theatre Guild, Inc., one of the leading producers of legitimate attractions in the United States, which arrangements are approximately as follows: The Guild customarily presents three of its own productions and three outside productions during each theatrical season. Tickets for these attractions are sold on a subscription basis on behalf of the Guild by the American Theatre Society and such sales represent a substantial portion of the box office receipts. This Society, through a play selection committee, also selects those attractions which are to be included in the subscription season of the Guild. The public, in reliance on the Guild's selection of legitimate attractions, pays large sums of money in various cities of the United States for subscriptions therefor. The defendants Shuberts and Heiman own a substantial block of stock in the American Theatre Society, and the defendants Lee Shubert and Heiman comprise two of the four

members of its play selection committee. The defendants Shuberts and Heiman have also made substantial investments in Guild productions.

B. Booking

37. The defendants Shubert- and Heiman control the booking of legitimate attractions in try-out and road-show towns throughout the United States. Furthermore, the defendants Shuberts control the booking of approximately 50% of the theatres in New York City.

38. Prior to 1932, when the defendant UBO was organized, two booking offices, both located in New York City, were available for the booking of legitimate attractions in try-out and road-show towns. These were the Klaw-Erlanger office, controlled by the Erlanger family, and the Shubert office, controlled by the Shuberts. Each booked primarily into its own chain of theatres. In or about 1928, the defendant Heiman became a partner in the Erlanger theatre interests, including a share in the Klaw-Erlanger booking office. In 1931 the Shubert Theatre Corporation went into receivership, the defendant Lee Shubert and the Irving Trust Company being appointed receivers. In or about August 1932, the Klaw-Erlanger booking office and the Shubert booking office were merged, the resulting combination being known as the United Booking Office, Incorporated. UBO issued five hundred shares of stock; of these Lee Shubert and the Irving Trust Company, as receivers, obtained 250 shares, and Leonard Bergman, a member of the Erlanger family, obtained the other 250. On May 3, 1933, Heiman acquired 125 shares of this stock from Bergman and on March 17, 1944, the other 125 shares. Prior to this last transfer Heiman represented both his own interests and those of Bergman in UBO. In the interim, the Shuberts organ-

ized Select which purchased from the receivers the entire assets of the Shubert Theatre Corporation, including 250 shares of UBO stock. The formal transfer of UBO stock to Select occurred on June 30, 1933. Thus, the stock of UBO is now owned 50% by Heiman and 50% by the Shuberts, through Select.

39. For a number of years Heiman has been the president and one of the four directors of UBO. Lee Shubert is vice-president and director. Of the other two officers of UBO, one is an associate of the Shuberts, the other an associate of Heiman. Likewise, of the remaining two directors of UBO, one is a nominee of Heiman, the other a nominee of the Shuberts. UBO also employs two booking managers, Augustus Pitou and Elias Weinstock. Pitou was formerly connected with the Klaw-Erlanger office and is the Heiman representative in UBO. In addition to his booking duties, Pitou has over-all supervision of the Heiman-operated theatre in Boston, Massachusetts and of the Heiman-operated theatre in Pittsburgh, Pennsylvania; the latter theatre, the Nixon, was sold in 1948 by Heiman to make way for an office building and is scheduled for demolition in 1950. The other booking manager of UBO, Elias Weinstock, is the Shubert representative in UBO, having occupied that position since 1939 when his predecessor, Jules Murry, died. Weinstock spends approximately half his time booking for UBO and devotes the remainder of his time working for the Shuberts. He books legitimate attractions for several Shubert-operated theatres in try-out and road-show to towns and for all the Shubert-operated theatres in New York City. He also manages the Shubert-operated Booth Theatre in New York City.

40. In 1932 the defendants adopted a policy whereby UBO entered into franchise agreements with operators

of theatres in various road-show towns throughout the United States where the defendants themselves did not operate theatres. Under each of these agreements the operator appointed UBO exclusive booking agent for the booking of legitimate attractions into the theatre and agreed to pay UBO a fee of 5% of his share of the gross receipts from all legitimate attractions presented at the theatre during the period of the franchise. The operator usually agreed not to transfer his interest in the theatre without consent of UBO and UBO in return agreed to use its best efforts to book for the theatre during the period covered by the franchise. It was also generally understood by the parties that if UBO granted a franchise to an operator in a particular town, it would not thereafter, during the period of the franchise, grant a second franchise to another operator in the same town. At the outset franchises covered periods varying from one to five years. Subsequently, UBO limited these franchises to a period of one year and usually negotiated new ones or renewals prior to each theatrical season. In or about 1946 UBO discontinued formal franchise agreements and adopted in lieu thereof a system of listings, whereby it was tacitly understood between the parties that they would continue the previous arrangements without a written contract.

C. Presentation

41. The defendants, as will hereinafter be described, are the only operators of theatres in virtually all key try-out towns and in several important road-show towns. In addition, approximately 50% of all the theatres in New York City are Shubert-operated theatres.

42. The defendants operate or participate in the

operation of approximately 40 theatres in eight States. The distribution of these theatres is as follows:

<i>City</i>	<i>No. of Theatres</i>
Baltimore, Md.	1
Boston, Mass.	6
Chicago, Ill.	7
Cincinnati, Ohio	1
Detroit, Mich.	2
Los Angeles, Calif.	1
New York, N. Y.	17
Philadelphia, Pa.	4
Pittsburgh, Pa.	1
	—
Total	40

A. *Baltimore.* The only theatre in this city at the present time is Ford's Theatre, which is leased and operated by UBO. Select, through a wholly-owned subsidiary, guarantees 50% of the obligations of UBO under the lease, and the other 50% is guaranteed by LAB.

B. *Boston.* There are six theatres in this city, all of which are controlled by the defendants. Four are Shubert-operated theatres as follows: Copley, Opera House, Plymouth, Shubert. Heiman, through LAB, operates the Colonial. In addition, the Shuberts and Heiman jointly operate the Wilbur Theatre.

C. *Chicago, Illinois.* There are nine theatres in this city, all but two of which are operated by the defendants. Six are Shubert-operated theatres, as follows:

Blackstone
Great Northern
Harris
Selwyn
Shubert
Studebaker

Heiman, through LAB, operates the Erlanger Theatre.

D. *Cincinnati, Ohio.* The only theatre in this city is the Cox, which is a Shubert-operated theatre.

E. *Detroit, Michigan.* There are three theatres in this city. Of these, the Shuberts have an interest in the operation of two, namely, the Cass and the Shubert-Lafayette.

F. *Los Angeles, California.* The only theatre in this city is the Biltmore, which is a Heiman-operated theatre.

G. *New York City, New York.* There are thirty-two theatres in this city. Of these, at least fifteen are Shubert-operated theatres, as follows:

Barrymore
Booth
Broadhurst
Broadway
Century
Cort
Golden
Imperial
Majestic
National
Plymouth
Royale
St. James
Shubert
Winter Garden

The Shuberts also own one-third of the stock of the corporation which operates the Music Box Theatre, and have the exclusive booking rights for, and a one-third interest in, the Lyceum Theatre.

H. *Philadelphia, Pennsylvania.* There are four theatres in this city, all of which are Shubert-operated theatres. These theatres are the Forrest, Locust, Shubert and Walnut Street.

I. *Pittsburgh, Pennsylvania.* The only theatre in this city is the Nixon, which is a Heiman-operated theatre. The theatre was sold in 1948 to make way for an office building, and it is scheduled for demolition in 1950.

43. In New Haven, Connecticut, there is only one theatre, the Shubert, which for a number of years prior to 1941 was a Shubert-operated theatre. It became an affiliated theatre in 1941 when a new corporation took over the lease and operation of the theatre under an agreement with a subsidiary of Select, whereby the operator agreed to accept only attractions booked through said subsidiary. This agreement was renewed in 1946 for a period of five years.

44. In Washington, D. C. there is at the present time no theatre. For a number of years two theatres in this city were available for the presentation of legitimate attractions, the Belasco and the National, both controlled by the defendants. By design and agreement of the defendants the Belasco was kept "dark" for a number of years so as to eliminate competition. In 1948 the defendant Heiman converted the National into a motion-picture house, despite the fact that Washington, D. C. is acknowledged to be one of the most desirable cities in the United States for the presentation of legitimate attractions. Other persons desiring to operate a theatre in Washington, D. C. have been unable to obtain a commitment from the defendants with respect to securing legitimate attractions, hence, making it difficult, if not impossible, for a person independent

of the defendants to operate a theatre in Washington, D. C.

45. In Toledo, Ohio, there is only one theatre, the Town Hall, which is owned by the Shuberts. In 1947, this theatre became an affiliated theatre when it was leased by the Shuberts under an agreement granting exclusive booking rights to UBO.

VI

INTERSTATE COMMERCE

46. The business of producing legitimate attractions for presentation in try-out towns, New York City, and road-show towns involves the securing of actors, scenery, costumes, appropriate lighting, music and other paraphernalia, then the welding of all the parts into presentable form through rehearsals, generally in New York City. When the rehearsals are completed, the entire cast and the scenery, costumes, lighting, music, and other paraphernalia are transported across State lines to a key try-out town such as Boston, Massachusetts; Philadelphia, Pennsylvania; Baltimore, Maryland; or New Haven, Connecticut. The try-out performances are an essential part of the fashioning of a successful vehicle for presentation in New York City and in road-show towns. If the attraction is successful in the try-out town, the cast and the scenery, costumes, lighting, music and other paraphernalia are then transported to New York City for presentation. If that presentation is successful, the actors and the above-mentioned essential and costly equipment are then transported across various State lines on a road-show tour to various cities in the United States. The road-show tour of a successful legitimate attraction is an integral part of the over-all presentation.

47. As a necessary part of the fulfillment of booking

contracts, legitimate attractions must go from State to State, staging performances here and there and fulfilling their contracts as much by the interstate movement as by the acting.

48. In the usual course of producing, booking, and presenting legitimate attractions there is a continuous flow of applications, letters, memoranda, communications, money, checks, drafts and other media of exchange from operators and other persons in various States of the United States across State lines to the defendants in New York City. Likewise, there is a continuous flow of memoranda, letters, commitments, contracts, and communications from the home offices of the defendants in New York City across State lines to operators and other persons in various States of the United States.

49. In the course of producing, booking and presenting legitimate attractions, there is a constant, continuous stream of trade and commerce between the States of the United States, consisting of the assemblage of personnel and property for rehearsals, the transportation of said personnel and property to various cities throughout the United States, the making and performing of contracts under which attractions are routed and presented in various States of the United States, and the transmission of applications, letters, memoranda, communications, commitments, contracts, money, checks, drafts and other media of exchange across State lines.

VII

OFFENSES CHARGED

50. The defendants, for many years last past, have been and now are engaged in a combination and conspiracy in restraint of the aforesaid interstate trade and commerce in the production, booking and presenta-

tion of legitimate attractions, and have combined and conspired to monopolize, and have attempted to monopolize and have monopolized the aforesaid interstate trade and commerce in the booking of legitimate attractions throughout the United States and in the presentation of legitimate attractions in Baltimore, Maryland; Boston, Massachusetts; Chicago, Illinois; Cincinnati, Ohio; Detroit, Michigan; Los Angeles, California; New York City, New York; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; and Washington, D. C., in violation of Sections 1 and 2 of the Sherman Act. The defendants threaten to continue such offenses, and will continue them, unless the relief hereinafter prayed for in this complaint is granted.

51. The aforesaid combinations and conspiracies to unreasonably restrain and to monopolize trade and commerce, the attempts to monopolize and the monopolizations of trade and commerce have consisted of a continuing concert of action among the defendants, the substantial terms of which have been that the defendants: (a) compel producers to book their legitimate attractions exclusively through the defendants; (b) exclude others from booking legitimate attractions; (c) prevent competition in the presentation of legitimate attractions; (d) discriminate in favor of their own productions with respect to booking and presentation; and (e) combine their power in booking and presentation in order to maintain and strengthen their domination in each of these fields.

52. Pursuant to said combinations and conspiracies, attempts to monopolize and monopolizations, the defendants have done the things they agreed to do, by the following means, among others:

(a) Conditioned their investments in the productions of legitimate attractions by others upon

agreements by the producers to book each of those attractions exclusively through the defendants;

(b) Booked substantially all legitimate attractions produced by the defendants;

(c) Forced producers to grant to the defendants the exclusive right to book the legitimate attractions of said producers for an entire theatrical season;

(d) Conditioned the booking of legitimate attractions into theatres in try-out towns upon agreements by the producers to book each of those attractions exclusively through the defendants thereafter;

(e) Conditioned the booking of legitimate attractions into Shubert-operated theatres in New York City upon agreements by the producers to book each of those attractions exclusively through the defendants thereafter;

(f) Coerced producers who had booked independently of the defendants to pay penalties or to accept unfavorably discriminatory booking terms, as a condition of obtaining bookings through them;

(g) Entered into agreements with operators whereby said operators agreed to present only attractions booked through the defendants and defendants agreed not to book for competing operators;

(h) Excluded legitimate attractions booked independently of the defendants from theatres operated by them and from affiliated theatres;

(i) Excluded legitimate attractions booked through the defendants from theatres competing with affiliated theatres or with those operated by the defendants;

(j) Harassed operators of competing theatres;

(k) Coerced and intimidated independent thea-

tre operators located in towns where the defendants operated theatres, or where they desired to operate theatres, to relinquish control of their theatres or a share of the profits thereof, by expressed or implied threats to deprive them, by virtue of the defendants' control of booking, of access to legitimate attractions;

(1) Acquired control of the operation of competing theatres.

VIII

EFFECTS

53. The concerted action of the defendants pursuant to and in furtherance of the violations of law alleged in this complaint have had, among others, the following effects:

(a) Producers have been forced to book exclusively with the defendants, on non-competitive terms, in order to obtain access to suitable theatres;

(b) Persons have been denied the right to engage in the business of operating a booking office in competition with the defendants;

(c) Operators of independent theatres in cities where the defendants operate theatres, or where affiliated theatres are located, have been systematically excluded from obtaining legitimate attractions;

(d) In many cities where the defendants operate theatres, or where affiliated theatres are located, operators of independent theatres have been forced out of the business of presenting legitimate attractions;

(e) Persons have been denied the right to engage in the business of presenting legitimate attrac-

tions in cities where the defendants operate theatres, or where affiliated theatres are located;

(f) In cities where the defendants operate theatres, or where affiliated theatres are located, the public has been deprived access to legitimate attractions and the benefits which flow from free enterprise and open competition;

(g) The interstate commerce in production, booking, and presentation has been unreasonably restrained and the interstate commerce in booking and presentation has been monopolized.

PRAYER

WHEREFORE, plaintiff prays:

(1) That the Court adjudge and decree that the defendants, and each of them, have combined and conspired to unreasonably restrain and to monopolize trade and commerce, have attempted to monopolize and have monopolized trade and commerce, as hereinbefore alleged, in violation of Sections 1 and 2 of the Sherman Act.

(2) That the defendants herein, their subsidiaries, and each of them, and each and all of their respective officers and directors, and each and all of their respective agents, servants and employees, and all persons acting or claiming to act on behalf of the defendants, their subsidiaries, or any of them, be perpetually enjoined and restrained from continuing to carry out, directly or indirectly, expressly or impliedly, the combinations and conspiracies to unreasonably restrain and to monopolize trade and commerce, the attempts to monopolize and the monopolizations of trade and commerce, as hereinbefore alleged, in the production, booking and presentation of legitimate attractions, and any similar conspiracies, attempts to monopolize, or monopolizations.

(3) That the Court adjudge and decree that the integration by the defendants of the production, booking and presentation branches of the legitimate theatre business has been used unlawfully as an instrumentality of monopoly and restraint upon interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

(4) That the Court adjudge and decree that the defendants have used their interest in and control of presentation and booking to restrain trade and commerce in the production of legitimate attractions in violation of Section 1 of the Sherman Act.

(5) That the Court adjudge and decree that the defendants have used their interest in and control of presentation and their interest in production to restrain and to monopolize trade and commerce in the booking of legitimate attractions in violation of Sections 1 and 2 of the Sherman Act.

(6) That the Court adjudge and decree that the defendants have used their interest in and control of presentation and booking and their interest in production to restrain and to monopolize trade and commerce in the presentation of legitimate attractions in violation of Sections 1 and 2 of the Sherman Act.

(7) That the Court

(a) order and direct the defendants to divest themselves of all interest in either the booking branch or the presentation branch of the business, under terms and conditions which will assure that no divested interest or no retained interest will be used in restraint of trade, and retain jurisdiction for the effectuation of its order;

(b) perpetually enjoin and restrain each of the defendants from acquiring any interest in that branch of the business so relinquished; and

(c) order and direct the defendants, and each of them, (in the event that the Court permits the

defendants, or any of them, to engage in presentation) to divest themselves of all interest and ownership in such theatres as may be necessary to dissipate the effects of the unlawful activities hereinbefore alleged, and to restore competition in such trade and commerce; and that the Court perpetually enjoin and restrain said defendants from acquiring any interest in any theatre except upon a showing to the Court that such acquisition will not unreasonably restrain the trade and commerce in the presentation of legitimate attractions in any section or community, or tend to create a monopoly in that line of commerce.

(8) That the plaintiff have such other relief as the Court may deem appropriate in order to prevent restraints of trade and commerce, attempts to monopolize and monopolizations in any branch of the business in which defendants may hereafter be engaged.

(9) That the plaintiff recover its costs herein.

Dated:

(S.) J. HOWARD McGRATH,

Attorney General.

(S.) HERBERT A. BERGSON,

Assistant Attorney General.

(S.) IRVING H. SAYPOL,

United States Attorney.

(S.) MELVILLE C. WILLIAMS,

Chief, New York Office.

(S.) RICHARD K. DECKER,

(S.) HERBERT N. MALETZ,

(S.) HAROLD LASSER,

(S.) HENRY M. STUCKEY,

(S.) VICTOR A. ALTMAN,

(S.) ESTELLA L. BALDWIN,

Attorneys for the United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

Civil Action No. 56-72

UNITED STATES OF AMERICA, PLAINTIFF,

against

LEE SHUBERT, JACOB J. SHUBERT, MARCUS HEIMAN,
UNITED BOOKING OFFICE, INCORPORATED, SELECT
THEATRES CORPORATION, L. A. B. AMUSEMENT COR-
PORATION, DEFENDANTS

(Filed Dec. 30, 1953, 3:00 P. M., U. S. District Court,
S. D. of N. Y.)

OPINION

Philip Marcus, Esq., Special Assistant to the At-
torney General, Attorney for Plaintiff.

Klein & Weir, Esqs., Attorneys for defendants, Lee
Shubert, Jacob J. Shubert and Select Theatres Cor-
poration.

Cravath, Swaine & Moore, Esqs., Attorneys for de-
fendants, Marcus Heiman and United Booking Office,
Inc.

Lipper, Shinn & Keeley, Esqs., Attorneys for de-
fendant, L. A. B. Amusement Corporation.

KNOX, C. J. December 1953.

KNOX, C. J.

In principle, I can see no valid distinction between
the facts of this case and those which were before the
Supreme Court in the cases of *Federal Baseball Club
of Baltimore v. National League of Professional Base-
ball Clubs*, 259 U. S. 200, and *Toolson v. New York*

Yankees, et al, decided by the Supreme Court on November 9, 1953.

Upon the authority of these adjudications the complaint in the above entitled action will be dismissed.

December 30, 1953.

JNO. C. KNOX,
Chief Judge.